

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 73.202(b))	MB Docket No. 08-68
FM Table of Allotments,)	RM-11421
FM Broadcast Stations.)	
(Beatty and Goldfield, Nevada))	

NOTICE OF PROPOSED RULEMAKING

Adopted: October 8, 2008

Released: October 10, 2008

Comments Date: December 1, 2008

Reply Comments Date: December 16, 2008

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it a petition for rule making filed by Keilly Miller (“Petitioner”), proposing the allotment of Channel 259A at Beatty, Nevada, and Channel 262C1 at Goldfield, Nevada, to accommodate a hybrid FM change of community of license application that proposes the substitution of Channel 261C3 for Channel 261C at Beatty, Nevada, and reallocation of Channel 261C3 from Beatty, Nevada to Crystal, Nevada, as its first local service, and modification of the construction permit for a new FM station at Beatty.¹ In compliance with the Commission's new procedures,² Petitioner has concurrently filed FCC Form 301 applications for Channel 259A at Beatty, Nevada, and Channel 262C1 at Goldfield, Nevada, and the necessary filing fees.³

2. Petitioner proposes the allotment of Channel 259A at Beatty, Nevada to prevent the potential removal of Beatty’s first local service due to the associated hybrid community of license application requesting the reallocation of unbuilt New FM Station to Channel 261C3 at Crystal.⁴ A staff engineering analysis indicates that Channel 259A can be allotted to Beatty consistent with the minimum distance separation requirements of the Rules with a site restriction 8.6 kilometers (5.3 miles) west located at reference coordinates 36-56-05 NL and 116-51-00 WL.⁵

¹ See File No. BMPH-20070727ABV.

² See *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, Report and Order, 21 FCC Rcd 14212 (2006).

³ See File No. BNPH-20070727AHY and File No. BNPH-20070727AUO, respectively.

⁴ See *Linden, Texas et al.*, Report and Order, 16 FCC Rcd 10853 (MMB 2001)(holding that removal of unbuilt facilities does not present the same loss of service concerns as removal of a licensed station).

⁵ The Petitioner filed a Petition for Reconsideration pertaining to a staff letter decision, which returned the aforementioned petition for noncompliance with Section 73.315(a) of the Rules with respect to the proposed allotment of Channel 259A at Beatty. See *Letter to John S. Neely Esq.* (MB Oct. 5, 2007). Generally, in FM allotment proceedings, a new “drop-in” allotment proposal must provide a 70 dBu coverage signal contour to the entire proposed community in accordance with Section 73.315(a) of the Rules. However, the Commission has waived this requirement for instances where a petitioner can demonstrate substantial compliance with the general rule. See *Garro W. Ray*, 36 FCC 1038, 2 R.R. 2d 399 (1964); *KDEF Broadcasting Co.*, 30 FCC 635, 20 R.R. 2d 684 (1961); *Manchester Broadcasting Co.*, 24 FCC 199, 14 R.R. 219 (1958) (stating that it clear that the term ‘most distant residential section’ as used in Section 73.188(b)(2) refers to an urbanized residential area and not to

(continued...)

3. Petitioner also requests the allotment of Channel 262C1 at Goldfield, Nevada, as it first local FM service. Petitioner states that Goldfield is already deemed as a licensable community since Goldfield is the community of license for primary TV Station KEGS, Channel 7 licensed to Nevada Channel 3, Inc.⁶ A staff engineering analysis indicates that Channel 262C1 can be allotted to Goldfield consistent with the minimum distance separation requirements of the Commission’s Rules (the “Rules) with a site restriction 0.6 kilometers (0.4 miles) northeast of the community located at reference coordinates 37-42-41 NL and 117-13-56 WL.

4. The Petitioner’s proposal warrants consideration because it could provide a first local service to the communities of Beatty and Goldfield, Nevada. Therefore, we will solicit comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Rules, with respect to Dilley, Texas:

Community	Channel No.	
	Present	Proposed
Beatty, Nevada	-----	259A
Goldfield, Nevada	-----	262C1

5. The Commission’s authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached *Appendix* and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the *Appendix* before a channel will be allotted.

6. Interested parties may file comments on or before December 1, 2008, and reply comments on or before December 16, 2008 and are advised to read the *Appendix* for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on Petitioner, as follows:

John S. Neely, Esq.

(...continued from previous page)

essentially rural area which may exist within a city’s political boundaries). Petitioner has submitted an engineering exhibit demonstrating that while the proposed city-grade service does not encompass the entire Beatty census designated boundary, it encompasses the entire town site of Beatty. In this instance, most potential listeners reside within the town site of Beatty instead of the entire Beatty census designated boundary which is mostly rural and unpopulated. Additionally, Petitioner notes that the Commission has determined that a 5mV/m contour signal which encompass the entire town site of Beatty instead of the census designated boundary was acceptable for city-grade coverage requirements in accordance with Section 73.24(l) of the Rules when it granted a new construction permit for Station KDAN(AM), Beatty, Nevada, File No. BNP-20041029AGC. See 47 C.F.R. § 73.24(l). As such, Petitioner argues that similarly situated applicants must receive equal treatment. Citing *Green County Mobilephone, Inc. v. FCC*, 765 65 F. 2d 235 (D.C. Cir. 1985) and *New Orleans Channel 20, Inc.*, 830 F. 2d 361,366 (D.C. Cir. 1987). We hereby grant reconsideration because Petitioner has demonstrated substantial compliance with Section 73.315(a) of the Rules. See *Cape Coral, Florida*, Federal Register, 47 FR 8362 (1982) (allotting a new allotment to the township of Cape Coral where Petitioner demonstrated substantial compliance with principal city grade coverage requirements by submitting documentation showing that principal community contour would cover populated areas).

⁶ See File No. BLCT-20020411AAM, Facility ID# 86201.

Counsel to Keilly Miller
Miller and Neely, P.C.
6900 Wisconsin Avenue, Suite 704
Bethesda, MD 20815

7. Parties are required to file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. **All filings must be addressed to the Office of the Secretary, Federal Communications Commission. Any filing that is not addressed to the Office of the Secretary will be treated as filed on the day it is received in the Office of the Secretary. See 47 C.F.R. § 1.7. Accordingly, failure to follow the specified requirements may result in the treatment of a filing as untimely.**

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to a rule making proceeding to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.⁷ This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

9. For further information concerning this proceeding, contact Rolanda F. Smith, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a *Notice of Proposed Rule Making* until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioners constitutes an *ex parte* presentation and shall not

⁷ See *Certification that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Makings to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*. 46 FR 11549 (February 9, 1981).

be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this *Appendix* is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. The person filing the comments shall serve comments on the petitioners. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. A certificate of service shall accompany such comments and reply comments. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center, at its headquarters, 445 12th Street, S.W., Washington, D.C.